IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.370 OF 2007

The Palm Acres Co-Operative
Housing Society Limited .. Petitioners.

Versus

Shree Mulund Construction Co. & Ors. .. Respondents.

Mr.Arif Bookwala with Mr.Bipin Joshi for petitioners.
Ms.K.C.Nichani i/b.M/s.Mahesh Jani & Co. for respondents.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 5th October, 2007.

P.C.:

1. The arbitration petition is directed against the order passed by the Arbitral Tribunal on 5th July, 2007, on the application of the petitioners / claimants for amendment of the statement of the claim.

2. The submission of Mr.Bookwala, learned Senior Counsel, appearing for the petitioners is that the order which runs into about 17 pages and contains 24 paragraphs,

not only rejects the application for amendment on the ground that it lacks bonafides and is grossly delayed but on merits as well. He invites my attention to the order and more particularly, paragraphs 10 to 12 and the findings recorded in paragraphs 18 & 20. He submits that the claim, which was made by the petitioners-claimants under the amendment application stands completely rejected. The Arbitrator has omitted the same from his consideration. Thus, all that remains is to go by the unamended claim and complete the adjudication so also render the Final Award. In such circumstances, the petition is maintainable as the order partakes the character of an Interim Award.

3. Mr.Bookwala submits that the amendment application could have been considered and allowed by applying all liberal principles and even if it was delayed, nothing prevented the Arbitrator from granting the same, provided the claimants were put to some terms. He submits that sub-Section 3 of Section 23 of the Arbitration and Conciliation Act, 1996, permits amendment on submitting claim or defence and only in exceptional cases, the application for amendment can be rejected. In such circumstances, this petition be entertained. In any event, it would be appropriate to decide at this stage,

according to Mr.Bookwala because if the final Award would be adverse to the petitioners and they are granted liberty to assail the order of 5th July, 2007 as well while elaborating their challenge to the final award, yet, this Court may not be in a position to resolve that controversy. He submits that at that stage, a remand may be necessary. In such circumstances, the petition be considered at this stage and appropriate orders be passed in the interest of justice.

4. Ms.Nichani, on the other hand, submits that the petition is not maintainable. She submits that neither Section 37 nor Section 34 would apply to the facts of this case. She submits that merely because an application for amendment is rejected, that by itself would not make the order an Interim Award. In such circumstances, the petition be rejected as not maintainable. Alternatively, she submits that the tribunal was justified in rejecting the application as enough discretion is conferred in that behalf by Section 23(3) on the Arbitral Tribunal. She submits that when the amendment application is not bonafide and there is gross delay, then, the Arbitrator was justified in rejecting the application.

5. I have perused the petition and the annexures

thereto, including the order of the Arbitral Tribunal. I have also perused the affidavit-in-reply filed on behalf of the respondents.

6. It is true that during the course of the arbitral proceedings, an application for amendment was filed on 21st August, 2006 by the petitioners. All that they urged was in the light of the Interim orders made by the Arbitral Tribunal and in the light of the events, which were subsequent to the filing of the original claim, it is necessary and in the interest of justice to amend the statement of the claim and apply for reliefs in terms of the subsequent events. It was specifically urged in the application that on the basis of the interlocutory orders, certain developments took place. In the draft amendment, it has been pointed out that after the Interim orders, the respondents laid down a drainage line by digging portion of the property of the claimants society to the extent of about 500 feet and affecting the rights of the claimants. There is an additional load put on the existing drainage line. There is a contravention of the terms and conditions of the M.O.U. and merely because the Municipal corporation has permitted or approved the course of action, that by itself does not mean that the claimants cannot recover any sums for breach of the terms and

conditions by the developer. Therefore, the cost of the drainage line which will have to be installed must be granted on the basis of the claim which is sought to be incorporated.

7. Although this application was opposed, the developer-respondent does not deny the subsequent events. The dates and events have been set out in the affidavit filed in reply to the amendment application and it is clear that interim order was passed on 27th January, 2005, a review was applied on 5th August, 2005 and thereafter, further proceedings took place and ultimately a drainage line was laid on the basis of the municipal approval. The learned Sole Arbitrator does not dispute that the events were subsequent to the institution of the claim before him.

8. It is in these circumstances, that the ruling / order of the Arbitrator will have to be considered. I have perused the entire order and there is substance in the contention of Mr.Bookwala that the merits of the amendment application have to be gone into and adjudicated upon. Thus, the amended claim is rejected on merits at this stage itself. Therefore, it cannot be held that the present petition is not maintainable. When the amended

claim goes out of consideration on a detailed reasoning on merits, at this stage itself, then, it is futile to urge that the order cannot be treated as an Interim Award, atleast, in the facts of the present case. The Arbitral Tribunal may consider the amendment application to be inappropriate but sub-Section 3 of the Section 23 clearly states that the amendment for supplement is considered appropriate having regard to the delay in making it, then, the Tribunal may reject it. Thus, the Arbitral Tribunal is guided by the general principles of amendment and subsequently by Section 23 (3) of the Arbitration and Conciliation Act, 1996. In such circumstances, not only terming the application as lacking in bonafide but going ahead and adjudicating upon the merits of the amendment application was not fair, just and proper. The learned Arbitrator has thought that the amendment application is inappropriate, considering the fact situation. Thus, the amendment application is rejected not on the ground that it is inappropriate because of delay but it is rejected on merits as well. Therefore, the exercise of discretion against the petitioner was improper. That was not a proper course to have been adopted in the peculiar facts of this case. The learned Arbitrator was impressed by the fact that the claimants have closed their evidence and the respondents completed the evidence of one witness. In

such circumstances, dealing with the matter further by re-opening the case was not proper. However, even in this behalf, it is not as if the Arbitrator was powerless. He could have put the parties to terms. The Arbitrator has failed to control the proceedings but it is not as if the Arbitration and Conciliation Act, 1996 is not making any provisions in this behalf. Section 19 gives enough power and discretion to the Arbitral Tribunal. In such circumstances, by taking into consideration only the conduct of the claimants, the application should not have been rejected.

9. Having perused the petition and considering the facts in their totality, in my view, one opportunity deserves to be granted to the petitioners-claimants to amend the statement of the claim. However, that opportunity would be subject to the compliance with the terms set out as under :-

> "Upon the claimants depositing in this Court a sum of Rs.20,000/-, quantified as costs, the amendment application of the claimants is allowed. The claimants are permitted to include the claim for damages of Rs.50,00,000/- on account of the laying of the drainage line. No other claim for damages

under any head whatsoever shall be permitted to be incorporated."

10. The amendment to be carried out within a period of two weeks from today. Copy of the amended statement of the claim to be served on the respondents within a period of two weeks from the date of carrying out the amendment. The respondents are at liberty to file additional reply / written statement within a period of 15 days from the date of receipt of copy of amended statement of claim.

11. The claimants state before me that they will examine only one witness, whose evidence would be placed on affidavit, annexing therewith a compilation of all documents, relating to the amended claim. Such affidavit be served within a period of 10 days from the date of filing of additional reply / written statement. The Arbitral Tribunal shall be at liberty to fix the date for cross-examination of the claimants' witness. Cross-examination to be recorded and completed by the Arbitral Tribunal within such period as it deems fit and proper. No additional witness or evidence on the amended claim will be permitted. The Arbitrator shall not adjourn the proceedings which are scheduled before him on 22nd October, 2007 and shall subject to this order and

directions, allow parties to examine / cross-examine the witness of the claimants, who is presently in the witness box. The claimants state that they will not apply for adjournment on 22nd October, 2007.

12. Needless to state that the claimants are permitted to amend the statement of claim and will not be entitled to claim damages in any sum under any head if they do not abide by the directions stipulated above. Further needless to state that the claimants and the respondents have undertaken before me to endeavour and complete the proceedings as expeditiously as possible so as to enable the Arbitral Tribunal to render its Award before 31st December, 2007.

13. The Arbitration Petition is allowed subject to above. All contentions on merits of both sides are expressly kept open. The Arbitral Tribunal to decide the matter uninfluenced by any observations made in the order dated 5th July, 2007. The Arbitral Tribunal to adjudicate upon the claim on the basis of the oral and documentary evidence placed before it.

14. All concerned to act upon an authenticated copy of this order.

(S.C.Dharmadhikari, J.)